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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-488

UNITED STATES OF AMERICA,

Petitioner

v.

564.54 ACRES OF LAND, MORE OR LESS, SITUATED IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, and BENEDICT F. PASTORINI, et al., SOUTHEASTERN PENNSYLVANIA SYNOD OF THE LUTHERAN CHURCH IN AMERICA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals should have reversed and remanded for a new trial because of (1) confusing and inadequate jury instructions with respect to the application of the substitute facilities doctrine and (2) a misstatement of law made by the Government during its closing argument.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Introduction

This case presents legal questions which are neither significant nor unique. It satisfies none of the standards customarily considered for granting certiorari. Instead, the dispute involves established eminent domain principles which the Court of Appeals correctly and justly applied to the facts before it.

II. This Case Was Resolved by Reliance Upon Well-Settled Eminent Domain Principles

Typically, when the Government takes private property, it indemnifies the condemnee by paying fair market value for it. *United States v. Virginia Electric & Power Co.*, 365 U. S. 624, 633 (1961). Compensation so measured normally enables the landowner to purchase an equivalent facility with the amount awarded. *See* Note, *Cost of Substitute Facilities As a Measure of Just Compensation When There Is a Private Condemnee*, 1975 Duke L. J. 1133, 1142 n. 40; Note, *The Substitute Facilities Measure of Just Compensation: A Cautionary Remark*, 62 Iowa L. Rev. 1158, 1164 (1977). In this case, however, the Government took property which could not be replaced in the marketplace at a cost roughly equivalent to its market value. Therefore, the payment of fair market value would not indemnify the condemnee.

Accordingly, the Third Circuit invoked the well-known substitute facilities doctrine under which the case will be retried. Relying upon established eminent domain principles, the court below constructed a rigorous three-part test which the condemnee will have to satisfy before qualifying for this measure of compensation. The condemnee must prove that (1) the condemned facility was operated on a non-profit basis;[1] (2) the owner, exercising reasonable diligence, was unable to purchase a functionally equivalent replacement at a cost roughly equal to the fair market value of the taken facility; and (3) the facility provided a benefit to the community that was not as fully provided after the facility was taken (Petition at A. 28a).

This holding is rooted in numerous decisions of the Supreme Court. No Supreme Court decision conflicts with this holding,[2] and no Court of Appeals has ever held to the contrary. Applying a long line of eminent domain decisions to the facts presented, the Third Circuit correctly resolved the legal issues of this case.

This Court has always held that indemnification is the goal of the "just compensation" clause. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U. S. 470, 473-74 (1973); *United States v. Reynolds*, 397 U. S. 14, 16 (1970); *United States v. Virginia Electric & Power Co., supra*, 365 U. S. at 633; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 326 (1893). Although fair market value is often the measure of indemnification, the Supreme Court "has been careful not to reduce the concept of 'just compensation' to a formula . . . . [I]t has refused to make a fetish even of market value, since that may not be the best measure of value in some cases." *United States v. Cors*, 337 U. S. 325, 332 (1949). It has also said, in *United States v. Virginia Electric & Power Co., supra*, 365 U. S. at 633, that fair market value is "not an absolute standard nor an exclusive method

1. The Government concedes the charitable nature of the camping enterprise (Petition at A. 15a).

2. In fact, this Court provides the forum least likely to resolve what is essentially a factual dispute. The application of well-settled Fifth Amendment principles to the facts is a task peculiarly within the jury's province.

of valuation." Indeed, the first time this issue was addressed by this Court, "[a] method of compensation by substitution" was endorsed as "the best means of making the parties whole" when it was impossible to value a whole community condemned and flooded by a federal dam project. *Brown v. United States*, 263 U. S. 78, 83 (1923).

As the Government concedes, the *Brown* rationale has been applied routinely in a long line of condemnation cases. The Government now seeks to distinguish these cases on the ground that they involved governmental condemnees. As Judge Gibbons recognized on the first appeal of this case, however, the Fifth Amendment provides no basis for distinguishing between private and public condemnees when the federal government appropriates property (Petition at A. 83a).[3]

The Government would also have this Court believe that the substitute facilities measure results in a "windfall" to the condemnee. By applying the cost of substitute facilities measure, the Third Circuit gave the Government

3. The Government also argues that the doctrine applies only when the condemnee shoulders "a duty" (Petition at 10) or "an obligation to replace the facilities condemned" (Petition at 13). This "legal necessity" test—if it ever enjoyed any vitality—has long since been laid to rest. *See, e.g., United States v. Des Moines County, Iowa*, 148 F. 2d 448, 449 (8th Cir.), *cert. denied*, 326 U. S. 743 (1945). There is no reason now to resurrect this forgotten doctrine. The very cases cited by the Government reject the rigid "obligation" standard it proposes here. None of the courts in the cases cited—*United States v. Certain Property in the Borough of Manhattan*, 403 F. 2d 800 (2d Cir. 1968); *United States v. Streets, Alleys and Public Ways*, 531 F. 2d 882 (8th Cir. 1976); *United States v. Certain Lands Located in the Townships of Raritan and Woodbridge*, 246 F. 2d 823 (3d Cir. 1957); *State of Washington v. United States*, 214 F. 2d 33 (9th Cir.), *cert. denied*, 348 U. S. 862 (1954)—found the condemnee was under any strict legal duty to replace the condemned facilities. Rather, the courts employed flexible "factual necessity" or "reasonable necessity" standards similar to the one adopted by the Third Circuit.

an alternative[4] which may, in fact, be utilized to *prevent* a windfall.[5] When applicable, the cost of substitute facilities will be awarded even if fair market value is greater. *See United States v. Streets, Alleys and Public Ways, supra*, 531 F. 2d at 885; *United States v. Certain Property in the Borough of Manhattan, supra*, 403 F. 2d at 803. To characterize it as a "windfall" is to inject a factual issue at the appellate stage and misconstrue the function of the doctrine—indemnity.

III. No First Amendment Issue Is Presented

Contrary to the Government's assertions—raised here for the first time in the eight years of this proceeding—the determination of "just compensation" raises no issues under the Establishment Clause of the First Amendment. The only question before the trial court is the determination of "just compensation" required under the Fifth Amendment when the federal government condemns property. The fact that the property was owned by the Southeastern Pennsylvania Synod of the Lutheran Church is immaterial to the resolution of this question. As Judge Gibbons pointed out in the first appeal: "The basic principle underlying the constitutional requirement of 'just compensation'

4. Other compensation approaches enjoy widespread approval. The capitalized earnings approach is often employed for profit-making facilities, *see* 4 *Nichols' Eminent Domain* § 12.32[3][c] (Rev. 3d ed. 1976); Note, *The Substitute Facilities Measure of Just Compensation: A Cautionary Remark*, 62 Iowa L. Rev. 1158, 1165 (1977), and replacement cost less depreciation is used for certain "specialty" properties. *See* 4 *Nichols' Eminent Domain, supra*, § 12.32[3][b].

5. For example, a new school located on valuable urban property may be relocated and rebuilt in a suburban location at a cost far less than the fair market value of its downtown property. The Third Circuit now gives the option of providing the *lesser* measure of compensation in this situation—the cost of substitute facilities. Such a result is fair to both condemnor and condemnee.

is one of indemnity. The condemnee 'is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but he is entitled to no more' " (Petition at A. 80a).[6] The Synod has asked only for "just compensation" and not for any "aid" which could result in the "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Committee for Public Education v. Nyquist*, 413 U. S. 756, 772 (1973), *quoting Walz v. Tax Commission of the City of New York*, 397 U. S. 664, 668 (1970). It seeks merely to be placed in as good a pecuniary position as if its property had not been taken.[7]

The Government, quoting Judge Stern's concurrence, states that " a governmental inquiry to determine whether an activity engaged in by a church 'benefits the community' is 'obnoxious under our constitutional framework' " (Petition at 19). No further explanation for this objection is given nor any citation of authority provided. It is, therefore, not clear where the Government's point is meant to lead. Surely the Government cannot intend to say that if the community benefit test is objectionable the substitute facilities measure of "just compensation" becomes inapplicable. Such a contention would itself lead to a most direct interference with the free exercise of religion. Otherwise phrased, the Government's proposition would be that when the property of a church is condemned it cannot receive the "just compensation" guaranteed by the Fifth Amendment to all other property owners. It is submitted that such a proposition does not warrant examination upon certiorari.

6. The Government asserts that the substitute facilities measure of compensation results in a "windfall" for the condemnee (Petition at 20). It further asserts that this "windfall" will influence future condemnations and so divide the community along religious lines (Petition at 22). As demonstrated above, however, the substitute facilities measure simply indemnifies a condemnee where there is no ready market in which to otherwise measure the appropriate indemnification.

7. Since this case presents no aid to religion issue, the Government's hypothetical contention (Petition at 21) that the condemnation award might be applied to the training of Lutheran missionaries or other institutional purposes and so requires excessive governmental entanglement in the Synod's operations is irrelevant and inapplicable. Moreover, as Judge Van Dusen noted (Petition at A. 6a), the Synod has purchased a replacement site and undertaken an extensive construction program, and the condemnation award in this case will be applied to that facility.

IV. The Order Appealed From Is Interlocutory

The Third Circuit remanded this case to the District Court for a new trial. Anxious to invoke this Court's jurisdiction, the Solicitor General argues that, despite its interlocutory status, this case merits Supreme Court review. As demonstrated above, however, this case presents neither unusual nor important questions of federal eminent domain law. Therefore, this Court should follow its usual practice of denying review for lack of finality. *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. R. Co.*, 389 U. S. 327, 328 (1967).

CONCLUSION

This case does not present a question of eminent domain law meriting Supreme Court review. There is no conflict with the decisions of other Circuits. There is no departure from established legal standards.

WHEREFORE, it is respectfully submitted that there is no reason to grant the petition and it should be denied.

Respectfully submitted,

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